In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1627

JACKSON COUNTY, MISSOURI, KANSAS CITY, MISSOURI, AND THE OFFICE OF PUBLIC COUNSEL OF THE STATE OF MISSOURI,

Petitioners,

vs.

THE PUBLIC SERVICE COMMISSION OF MISSOURI AND MISSOURI PUBLIC SERVICE COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Missouri

PETITIONERS' REPLY MEMORANDUM

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It is suggested in the briefs filed by the Missouri Public Service Commission (PSC) and the Missouri Public Service Company (utility) that Petitioners have no standing to complain about lack of procedural due process, have no interest in this cause, that there is no case or controversy, and that the Court is being requested to make a hypothetical ruling, and therefore, certiorari should not be granted. Pursuant to Rule 24(4) this reply is made.

Petitioners Jackson County and Kansas City are ratepaying consumers of electricity, while the Office of Public Counsel is a state agency of Missouri, estab-

lished by the General Assembly to represent the consumers' interests in public utility matters. As pointed out in the Petition (pp. 3-4) the rate change process was initiated by the utility filing a new tariff schedule on August 5, 1974 pursuant to §393.140(11), R.S.Mo. (1969), but no notice of this filing was given or ordered by the PSC to affected consumers. Under the statutory procedure employed (which is still in effect) no notice is required or given to consumers of the filing of tariffs, nor is any hearing opportunity afforded. Petitioners learned of the filing by chance and filed motions to strike the filing, which the PSC overruled. Later, however, the PSC did decide to suspend the filing and hold hearings which it is empowered, although not required, by statute to do. After the decision to suspend was made, notice was then given to some consumers by the PSC of hearings to be held at a later date, but this did not occur until *after* the original filing had been made.

In June 1975 the PSC authorized the utility to increase its electric rates to its consumers as of July 1, 1975 to provide $5,593,000.00 in additional annual revenues, and these new rates went into effect on such date. On July 11 Petitioners filed their petition in the Circuit Court for judicial review of the PSC decision, and their motion for its immediate reversal. One ground urged for the requested reversal was that the method chosen to initiate rate increases (the "file" procedure) was unlawful, and the utility should have proceeded by means of a complaint method instead and therefore the proceedings before the PSC were void from their inception and as a result the PSC order was unlawful. Hearing was held by the Circuit Court on the motion, and on July 25 a judgment was

entered reversing the PSC decision, in part, because he determined the "file" method an unlawful way to initiate such rates changes (Pet., App. B, A6).

The Court, however, also ruled that a stay of the reversal would be allowed, while the Respondents appealed to the Missouri Supreme Court, if the utility posted an appeal bond in the amount of 5.6 million dollars. This appeal bond permitted the utility to continue to collect the new rate effective as of July 1, but required the utility to pay back to its customers (including Jackson County and Kansas City) any unlawful rate collected after the date of the bond's posting, if the reversal was upheld.

The gravamen of Petitioners' contentions is that the use of the "file" method under §393.140(11) is constitutionally unlawful because it fails to accord rate-paying consumers procedural due process and equal protection of the law as guaranteed by the Fourteenth Amendment of the U.S. Constitution and the decisions of this Court. These issues were briefed and argued before the Missouri Supreme Court, and squarely considered in all three opinions therein (See A28-33, 33-34, 36-42).

In Petitioners' arguments to the Missouri Supreme Court, it was contended that the Fourteenth Amendment required notice and some kind of hearing before rates could be changed. It was further argued that the Missouri statutes provided a procedure under §393.270, R.S.Mo. (1969) which met this requirement, and should have been employed. Petitioners also complained that if utilities were exempted from the requirements of §393.270 the statutory scheme would then not only fail to meet due process requirements but

would constitute a denial of equal protection guaranteed by that amendment because such an exemption construction would create two separate and distinct procedures, with the one more significantly favorable by being exclusively available only to the utilities. This result would render the §393.140(11) unconstitutional (at least as applied by the PSC) because there was no rational basis demonstrated for establishing such disparate treatment of utilities and consumers.

The issues are certainly live questions because Petitioners urged that the "file" method which was used to initiate the rate change should not have been employed because of constitutional infirmities, which the Missouri Supreme Court clearly decided. Petitioners believe that if the initiation procedure is invalid then so are the fruits thereof—the PSC decision authorizing the increased rates. A reversal here would result in (1) a return to Petitioners of all of the unlawfully increased portion of the rate collected from the date that the appeal bond became effective, and (2) a discontinuance of the unlawful rate.[1]

Questions raised by Respondents' briefs essentially deal with whether this case is a proper subject for judicial resolution of the issues presented, rather than a denial by them of the importance and substantiality of the constitutional questions presented. Jackson County and Kansas City are ratepaying consumers directly affected by agency order because they pay an

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1. The Missouri Supreme Court on February 23, 1976 ordered the mandate stayed and the bond to continue in effect until this Court decided on the petition for certiorari.

increased rate, which they claim was unlawfully initiated and allowed. As noted above, if a reversal is ordered these two Petitioners would be entitled to a return of part of the unlawful rate paid by virtue of the appeal bond and to a discontinuance of the unlawful rate's collection. In addition, Petitioners here, by their respective political and legal responsibilities represent large numbers of individual consumers (the Office of Public Counsel represents, by legislative direction, all of the consumers of Missouri), who would participate in a refund and be affected by a discontinuance of an unlawful rate in the utility's service area.

Thus, there exists both a pecuniary stake and a representative interest, which this Court has indicated justifies judicial review. *Assoc. of Data Processing Service Organizations, Inc.* v. *Camp,* (1970) 397 U.S. 150, 153, held that whether a person had standing to challenge administrative action turned on whether the interest sought to be protected by the complainant was arguably within the area of interests to be protected or regulated by the statute or constitutional guarantee in question. And even though a pecuniary stake of the litigant might be miniscule, it has been held sufficient if he provides a suitable and effective vehicle for vindication of large issues. *Flast* v. *Cohen,* (1968) 392 U.S. 83. Again, as was pointed out in the Petition (pp. 14-15), there is nothing unusual or novel in granting the consuming public standing to challenge administrative action. *Office of Communication of the United Church of Christ et al.* v. *FCC,* (C.A. D.C. 1966) 359 F.2d 994, 1002.

The Missouri Supreme Court squarely ruled the questions now posed, deciding them against Petitioners (Pet. A28-33), and resting this conclusion on construc-

tion of the Fourteenth Amendment and this Court's decisions. The due process issues were likewise considered in the concurring (Pet. A33-34) and dissenting (Pet. A36-42) opinions. Despite the PSC suggestion that that issue posed before the Missouri courts was in some fashion waived or tardily invoked below (PSC Brf., 10-13), such was in fact raised in opposition to claims that were made in support of the lawfulness of the PSC order, namely that the procedures employed to initiate rate changes satisfied due process and equal protection requirements. It should be added that the PSC also attacked the consideration of the issues posed here before the Missouri Supreme Court, but which objections that court overruled (Pet. at A28, fn. 2), thereafter deciding the questions.

The issues presented here are purely legal ones, and therefore, appropriate for judicial resolution. *Abbott Laboratories* v. *Gardner,* (1967) 387 U.S. 136, 149. These issues are also of general importance because of the regular and frequent use of the "file" method procedure to increase rates which the consumer must pay for utility service, and because of the consumer's lack of voice in such a procedure. The "file" method of §393.140(11) by which this rate increase was initiated (and, ultimately, ordered) allows such increase to be accorded *finality,* which has the effect of law. But where such finality is accorded without notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and without affording them an opportunity to present their objections, then such is a fundamental lack of due process. *Mullane* v. *Central Hanover Bank & Trust Co.,* (1950) 339 U.S. 306, 314-315.

The statutory provision under attack here did not, and still does not, require that notice of a proposed

rate increase be provided affected ratepaying customers and does not allow them any kind of an opportunity to be heard. No notice was given ratepayers here of the utility's filing of the new proposed rate, although the Petitioners discovered the filing by accident. They then unsuccessfully filed motions to strike the filing, which the PSC denied.

Although Petitioners here did by chance obtain actual notice of the filing, it has long been this Court's rule that actual notice is not sufficient upon which to rest a final determination. If such notice was not directed by the statute, it cannot be employed to supply or give constitutional validity to the statute or to service thereunder. *Wuchter* v. *Pizzutti,* (1928) 276 U.S. 13, 24-25 (wherein the statute provided only for notice upon a state official, but not for any upon the individual, though the individual in *Wuchter* was actually served). This Court has further ruled that extra-official or casual notice, or a hearing granted as a matter of favor or discretion, is not a substantial substitute for the due process of law required by the Constitution and that *such must be provided as an essential part of the statutory provision* and not awarded as a mere matter of favor or grace. *Coe* v. *Armour Fertilizer Works,* (1915) 237 U.S. 413, 424-425.

Petitioners strongly urge that this case presents substantial fundamental questions for judicial resolution concerning proceedings which initiate and result in decisions raising a consumer's utility rate, but which deny to him notice of such a proposed increase and an opportunity to be heard on its propriety, before it becomes final and law. Further, the questions posed ask whether such a procedure is lawful in view

of the fact the utility (which holds a state sanctioned exclusive franchise or monopoly and is allowed rates with the force of law) enjoys superior procedural rights in the determination of a rate's reasonableness, which rights are denied to the ratepaying consumer.

Inasmuch as similar statutes exist in some thirty-four other jurisdictions (Pet., p. 11), and are regularly and frequently utilized to initiate rate changes, Petitioners urge that the questions raised are of more than local importance; indeed, are ones which this Court should hear and decide.

Respectfully submitted,

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